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UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Charles Wolff,

Plaintiff,

v.

New Hampshire Department of Corrections, et al.,

Defendants.

CIVIL ACTION NO. 06-321-PB

OBJECTION TO MOTION FOR PRELIMINARY INJUNCTION

NOW COME the Defendants, by and through their counsel, the Office of the Attorney General, and object to Plaintiff's Motion for Preliminary Injunction, stating as follows:

1. Plaintiff is an incarcerated inmate who has brought this action against the Department of Corrections and a number of its employees and officials on the ground that his civil rights have been violated in contravention of 42 U.S.C. §1983.

2. Plaintiff has filed a motion seeking an emergency preliminary injunction. Plaintiff has set forth two grounds for injunctive relief: (i) that the kosher diet which he is currently being provided is not nutritionally adequate, and (ii) that he is not being provided with adequate medical care.

3. As argued more fully below, the Plaintiff's motion is without merit and should be denied without the need for an evidentiary hearing.

Standard of Review

4. There are four factors which a trial court must weigh in deciding a motion for preliminary injunction: (i) the likelihood of success on the merits, (ii) the potential for irreparable

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harm to the movant if the motion is not granted, (iii) the balance of the movant's hardship if relief is denied versus the non-movant's hardship if relief is granted, (iv) the effect of the decision on the public interest. *N.H. Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996). Of these, the most significant is the first – the likelihood that Plaintiff will ultimately succeed on the merits.

Adequacy of the Kosher Diet

5. In his Motion, the Plaintiff alleges that the kosher diet he is currently receiving is inadequate. In particular, he claims that he is not being provided with any kosher beef or poultry. He claims that he is only receiving grain products and cheese.

6. Plaintiff's claims are belied by the affidavit of Jeff Perkins, the food service director at the New Hampshire State Prison ("NHSP") in Concord, New Hampshire. *See*, Affidavit of Jeff Perkins, Exhibit A. Mr. Perkins has 23 years of experience as a food service manager, and has received training in food service management from Southern Maine Technical Institute.

7. According to Mr. Perkins, the kosher meals that are served to inmates contain adequate, balanced nutrition. Appended to Mr. Perkins' affidavit is a sample menu for the kosher diet for one day at the New Hampshire State Prison. This menu is representative of the type of meals that are served to inmates on kosher diet. That sample diet contains a balanced mean of meats, grains, and vegetables. For example, breakfast consists of eggs, bread with jelly, a banana, and cereal. Lunch consists of baked fish with crackers, cookies, milk, and nuts. Dinner consists of a prepackaged kosher Salisbury steak meal, two slices of bread, a bottled water, carrot sticks and a banana.

8. Also appended to Mr. Perkins affidavit is a copy of the box containing one of the pre-packaged kosher meals served at dinner-time at the NHSP. The nutritional value is printed on the box, and shows that the pre-packaged dinner meal contains 270 calories, 13 g. of protein, and 30% of the daily RDA of Vitamin A and Vitamin C.

9. Given these facts, Plaintiff has very little chance of showing either likelihood of success on the merits, or irreparable harm if the injunction is not granted. For these reasons, the motion should be denied.

Adequacy of Medical Care

10. In his second claim, Plaintiff alleges that he is being denied adequate medical attention.

11. In order to make out a claim for inadequate medical treatment under the Eighth Amendment, Plaintiff must show that prison officials demonstrated "deliberate indifference to his serious medical needs." Estelle v. Gamble , 429 U.S. 97, 106 (1976). This test has both subjective (state-of- mind) and objective components. *See* DesRosiers v. Moran , 949 F.2d 15, 18 (1st Cir. 1991).

12. In regards to the state of mind requirement, a prison official is liable "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer v. Brennan , 511 U.S. 825, 847 (1994). The medical provider's conduct must go beyond mere negligence in diagnosing or treating the prisoner's medical condition. Similarly, a violation does not occur merely because a prisoner happens to disagree with a physician's decision regarding the proper course of medical treatment. *See* Watson v. Caton , 984 F.2d 537, 540 (1st Cir. 1993) ("The courts have consistently refused to create constitutional claims out of disagreements between prisoners and doctors about the

proper course of a prisoner's medical treatment, or to conclude that simple medical malpractice rises to the level of cruel and unusual punishment").

13. In this case, Plaintiff's claim should be denied because he has failed to set out any facts which demonstrate that he is likely to succeed on the merits of this claim, or to suffer irreparable harm if the motion is denied. Plaintiff's motion is largely illegible, and in many places barely decipherable. However, it appears that the basis of his claim is that the medical staff at NHSP are refusing to provide him the particular medicines that he feels he needs for his medical conditions, and have prescribed him different medications.

14. The law is clear that a disagreement with medical staff regarding the proper type of medical treatment does not give rise to an Eighth Amendment claim. Watson v. Caton , 984 F.2d 537, 540 (1st Cir. 1993). Plaintiff's pleadings make clear that he is receiving some treatment for his various ailments – there are references to Dr. Englander's various orders. Plaintiff simply disagrees with the course of treatment being provided. This is not sufficient to warrant a preliminary injunction.

15. No separate memorandum of law has been filed with this objection as the relevant facts and legal authority are cited herein.

WHEREFORE, the Defendants respectfully request that the Honorable Court:

A. Deny Plaintiff's motion for emergency preliminary injunction, without holding an evidentiary hearing;

B. Grant any additional relief as is just and proper.

Respectfully submitted,

NEW HAMPSHIRE DEPARTMENT OF
CORRECTIONS, ET AL.

By and through their attorneys,

KELLY A. AYOTTE
ATTORNEY GENERAL

\s\ Andrew B. Livernois_________

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Certification of Service

July 17, 2007

I hereby certify that a copy of the foregoing was mailed this day, postage prepaid, to Charles Wolff, *pro se*, P.O. Box 14, Concord, NH 03302.

/s/ Andrew B. Livernois
Andrew B. Livernois

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